Supreme Court of the United States

OCTOBER TERM, 1969

No. 440

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

RAYTHEON COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RELEVANT DOCKET ENTRIES

4. 6.65	Charge filed.
10.15.65	Amended Charge filed.
10.19.65	Complaint and notice of hearing issued.
10.19.65	Order consolidating cases and notice of hearing on objections, dated.
10.25.65	Respondent's answer to complaint, dated.
1.10.66	Respondent's motion for specification and production of evidence, dated.
1.19.66	Hearing Opened.
1.20.66	Hearing Closed.
6.12.66	Trial Examiner's Decision issued.
7.19.66	Respondent's statement of exceptions.
8. 5.66	General Counsel's cross exceptions, dated.
8. 9.66	Union's statement of exceptions, dated.
10. 5.66	Board's Decision, order and direction of Second Election, dated.
2. 8.68	Board's petition for enforcement filed.
2.21.68	Respondent's answer to petition for enforcement received.
1.16.69	Respondent's motion to dismiss petitions, with memorandum in support, dated.
1.27.69	Union's opposition and answer to motion, dated.
1.28.69	Board's memorandum in opposition to motion to dismiss, dated.

RELEVANT DOCKET ENTRIES

2.19.69	Decision of the Court of Appeals granting motion to dismiss, issued.
2.19.69	Judgments of the Court of Appeals, issued.
3.21.69	Board's petition for rehearing filed.
3.21.69	Union's petition for rehearing received.
5. 8.69	Order of the Court of Appeals denying the petitions for rehearing and rejecting the suggestion for rehearing *en banc*, issued.
8. 6.69	Board's petition for a writ of certiorari filed.
11.10.69	Order of the Supreme Court granting the Board's petition for a writ of certiorari.

160 NLRB No. 122

D-9224
Mountain View, Calif.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 20-CA-3554

RAYTHEON COMPANY

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO

Case No. 20-RC-6201 [1]

RAYTHEON COMPANY, EMPLOYER

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, PETITIONER

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On June 13, 1966, Trial Examiner William E. Spencer issued his Decision in the above-entitled consolidated proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint. In addition, he recommended sustaining certain objections to the election held on February 4, 1965, in Case No. 20-RC-6201, and setting aside the election. Thereafter, the Respondent filed a Statement of Exceptions, a "Brief in Support of Exceptions to Intermediate

[1] International Brotherhood of Electrical Workers, AFL-CIO, intervened in Case No. 20-RC-6201.

Report; and in Support of Portions of Intermediate Report," and an "Answering Brief to Brief of IUE in Support of Cross-exceptions." The General Counsel filed a Brief in Support of Certain Portions of the Trial Examiner's Decision, cross-exceptions, and a brief in support of its cross-exceptions. International Union of Electrical, Radio & Machine Workers, AFL-CIO, herein called the Charging Party, filed an Answering Brief to Respondent's Brief, cross-exceptions, and a brief in support of its cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified below.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations

[2] We agree with the Trial Examiner that the Respondent violated Section 8(a)(1) of the Act and interfered with the election by Supervisor Krest's coercive interrogation of employee Alvarado, and Vice President Hennemuth's coercive speeches to the employees. We also find, contrary to the Trial Examiner, that the announcement of new grievance procedures, in such speeches, constituted further violation of Section 8(a)(1) and further interference with the election. However, we find it unnecessary to, and therefore do not, rely on the Trial Examiner's finding of additional grounds for setting aside the election. There is no merit in the Charging Party's exception to the Trial Examiner's denial of its motion, made at the hearing, to amend the complaint to allege additional threats and promises of benefit. See *Local 1474-1, Pipe Coverers, International Longshoremen's Association (J.Q.H. Insulating Co., Inc., et al.)*, 147 NLRB 90, 93, footnote 4, Cf. *Automobile Workers* v. *Scofield*, 382 U.S. 205, 219, footnote 14.

Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, Raytheon Company, Mountain View, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified.

1. Add the following at the end of paragraph 1(a): "and promising new benefits as an inducement to employees not to engage in union activity."

2. Delete paragraph 1(b) and substitute the following: "In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959."

(3) In the Notice attached to Trial Examiner's Decision, add the following at the end of the first indented paragraph: "nor will we promise new benefits as an inducement to employees not to engage in union activity."

(4) Delete from the Notice the second indented paragraph, and substitute the following: "WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section

8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959."

(5) Delete from the Notice the last paragraph.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges unfair labor practices not found herein be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that the election held on February 4, 1965, among the Respondent's employees be, and it hereby is, set aside, and that Case No. 20-RC-6201 be remanded to the Regional Director for Region 20 for the purpose of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the appropriate unit at such time as the Regional Director for Region 20 deems appropriate. The Regional Director shall direct and supervise the election, subject to National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible shall vote whether they desire to be represented for collective-bargaining purposes by International Union of Electrical, Radio & Machine Workers, AFL-CIO; by International Brotherhood of Electrical Workers, AFL-CIO; or by neither.

Dated, Washington, D. C. Oct 5 1966

FRANK W. MCCULLOCH, Chairman

GERALD A. BROWN, MEMBER

SAM ZAGORIA, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

TXD-(SF)-73-66
Mountain View, Calif.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 20-CA-3554

RAYTHEON COMPANY

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO

Case No. 20-RC-6201

RAYTHEON COMPANY, EMPLOYER

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, PETITIONER

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Barry Jellison, Esq., and *Morton H. Orenstein, Esq.*, for the General Counsel.

Robert L. Molinar, Esq., and *Selig A. Saltzman, Esq.*, Lexington, Mass., for the Respondent.

Marilyn G. Rose, Washington, D.C., for the Charging Party and Petitioner.

Before: *William E. Spencer*, Trial Examiner

TRIAL EXAMINER'S DECISION

Statement of the Case

The complaint proceeding in this case, brought under Section 10(b) of the National Labor Relations Act as

amended (61 Stat. 136; 73 Stat. 519), hereinafter the Act, consolidated for hearing with objections to an election filed by the charging party and petitioner herein in Case No. 20-RC-6201, was heard in San Francisco, California, n January 19, 20, 1966, pursuant to due notice.

The complaint, issued 19 October, 1965 upon a charge filed April 6, 1965, and an amended charge filed October 15, 1965, alleged various conduct engaged in by the Respondent as violative of Section 8(a)(1) of the Act, conduct incorporated in the objections to the election with some additional matters.

The Respondent in its duly filed answer denied the said allegations. Upon the entire record in the case, consideration of briefs filed with me by each of the parties, and from my observation of witnesses, I make the following:

Findings of Fact

I. The business of the Respondent and Employer

Raytheon Company, a Delaware corporation, is engaged, among other things, in the design, development and manufacture of semi-conductor products and solid state devices. It has facilities located in several States, including Massachusetts and California. Its Mountain View, California plant is the locale of matters giving rise to this proceeding.

During the past year Respondent shipped products valued in excess of $50,000 from its California operations directly to customers outside the State.

II. The labor organization involved

International Union of Electrical, Radio & Machine Workers, AFL-CIO, hereinafter the Union or IUE, is a labor organization within the meaning of the Act.

III. The unfair labor practices

1. *The factual situation; issues*

Pursuant to a representation petition filed by IUE on January 4, 1965, an election among the production and

maintenance employees of Respondent's Mountain View, California plant, was conducted by the Board on February 4. The results were that 161 votes were cast for the IUE, 54 for IBEW, an intervenor, and 301 for no union. On February 11, IUE filed a petition to set aside the election and on April 6, the charge of unfair labor practices which initiated the present complaint proceeding. The issue, broadly stated, is whether Respondent by a series of speeches addressed to its employees on February 2 in a captive audience atmosphere, and by various other statements and conduct, violated Section 8(a)(1) of the Act, and by these alleged statements and conduct, and other matters alleged in the objections to the election, interfered with the free choice of its employees to a degree requiring that the election be set aside.

2. *The Krest-Alvarado incident*

In the week or so preceding the February 4 election, Employee Carol Alvarado was twice called to the desk of Nicola Krest, supervisor of the department in which she worked, and questioned concerning her union activities. Alvarado on these occasions was wearing an IUE badge indicating her support of that union, the only person in her department of some twenty employees that she observed wearing an IUE badge. Krest asked Alvarado why she wanted a union, and when the latter replied that she thought a union could provide employees with a better vacation and sick leave plan and higher wages, Krest replied that it would be impossible for the employees to achieve such additional benefits; that he had not complained to the employees on their work standards, but with a union certain work standards would be set and any employee not meeting them could be discharged; that if the Union was voted in, any employee who was late to work on more than three occasions would be discharged. On the second occasion Krest asked Alvarado if she had attended an IBEW meeting and if so, why. The foregoing is Alvarado's version of the two conversations.

Krest admitted that the conversations occurred; testified in substance that on the occasion of the first con-

versation he called Alvarado to his desk with respect to her requested transfer out of his department, and that Alvarado initiated the topic of unions by saying that if the employees had a union "things like this [the refusal of a transfer] wouldn't happen." Krest testified, "From that point on, we discussed several things about the union," and, in amplification, mentioned the topics of seniority and work standards. On the latter he testified, "I said that I am quite sure that if a union did come into the plant that the union, if they weren't satisfied with the standards which we had on the jobs, would bring in their own industrial engineers. I felt that if they found that our standard was extremely low, they would raise it, you know, if they thought it was completely out of the picture." Krest did not recall if the union was discussed in his second conversation with Alvarado which was concerned primarily, as was the first, with her request for a transfer.

I find, in sum, that Foreman Krest questioned Alvarado concerning her union activities, interrogated her concerning her desire for union representation, and stated, in substance and effect, that she stood to lose rather than gain through union representation in the matter of work standards, and would be unable to obtain the benefits she sought. His remarks took on added emphasis and significance when Robert G. Hennemuth, a company official, later addressed the employees on the same general topic of what union representation would mean to them.

3. *The February 2 Hennemuth speeches*

In its captive audience speeches, delivered successively to seven groups of its employees on February 2, the Respondent, through its industrial relations vice-president, Robert G. Hennemuth, counseled its employees to reject union representation. As urged in Respondent's brief, Hennemuth, though unequivocally partisan in his language, made his "pitch" without rancor and in an atmosphere which was undoubtedly calculated to, and did in fact convey the appearance of friendly counsel. At the close of his speech, there would be a period of ques-

tions from the floor responded to in good humor by Hennemuth, and other instances of good-humored give-and-take. Nevertheless, Hennemuth made it clear in the introduction to his remarks that he was a top figure in Respondent's hierarchy of officers and therefore spoke with authority, and frequently referred to the "legal" posture of his remarks. The body of his speeches was tape-recorded and transcriptions from the tapes were received in evidence. There were portions of his speech, however, which were not recorded, and therefore the transcriptions were not necessarily a refutation of the testimony of employees who heard the speeches. The latter, except for variations in emphasis, were not markedly at variance with the recorded portions of the speeches.

Hennemuth's speeches were organized and delivered under four major points or topics, and these will be alluded to seriatum.

First, Hennemuth stressed the importance of all employees voting and the secrecy of the ballot which would protect employees in voting against union representation even though they had signed one or more union authorization cards. "Regardless of whether you signed for one or both, that is not binding on you. . . . When you engage in this voting process on Thursday you are a free person."

Hennemuth's second point, and one that received the greatest emphasis and undoubtedly took precedence over others in the minds of the employees, was that if the employees chose union representation, negotiations on a contract would follow; that such negotiations would start from scratch and the employees could end up losing some of their present benefits;[1] that a union could not guar-

[1] Excerpts from Hennemuth's speeches: ". . . in a negotiation they [the employees] had to understand that legally the Company and the Union start from scratch . . . what happens in negotiation is that two parties sit down to negotiate and they start fresh—just as though nothing's on the table . . . in negotiations they have to get up to where you are—where the company is, first—before you even get any more." [This point was given added emphasis by a leaflet passed out by Respondent to its employees on January 14, 1965, which stated in part: "When a union comes into a plant, collective bargaining begins not at the present wage level, but at

antee them anything but could gain for them only such benefits as the company would grant;[2] that a union's only weapon for enforcing bargaining demands was the strike and that a strike would impose hardships on the employees who engaged in it.[3] Hennemuth told the employees, "My suggestion to you is that working for this company under the circumstances as I know them at least, I feel you don't need that kind of representation because I really feel that compared to other American citizens across the country working for a number of different companies, you don't look too bad at all, really,

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zero . . ."] In negotiations an employer might say, "Look, we are sick and tired of paying nine holidays and now we are only going to agree to five."

Further, on the combined credited and undisputed testimony of General Counsel's witnesses, Alvarado, Hudson, Lott and Carpenter, Hennemuth said that while employee insurance was now "free," if the Union won this benefit would have to be negotiated from scratch and the employees might end up having to pay for what they presently were getting free; gave a specific example of a company which took away bus fare formerly given its employees as a fringe benefit, when a union came into the plant; and said that they should not be misled by thinking that the benefits they presently had would necessarily continue if the Union came into the plant.

[2] Excerpt from Hennemuth's speeches: ". . . you should bear in mind that a union cannot guarantee you anything. Now I'm telling you, legally if I may in this sense, because if a union wins the right with any company to represent the employees involved, a period of negotiation must follow after that point and there comes into being between the union and the company after that *only what the company wants to agree to . . .*" (Emphasis supplied)

[3] Excerpts from Hennemuth's speeches: "So let's suppose that the company doesn't want to agree—what recourse does the union have? The only recourse is to strike . . . I'm sure you all have had some exposure to what a strike can mean. It's a harsh thing, it is a weapon that in my opinion personally is not a terribly useful thing to the unions because it imposes such a hardship on the people who are members of the unions. They go without pay during the entire period of the strike. Now sometimes there is a 'strike fund' a union may have but this is usually inadequate and then it usually often doesn't last except for a couple of weeks and it requires you to go out and do picket line duty, and so forth. Now, this might be all right in its place, understand. My suggestion to you is, that working for this company under the circumstances as I know them at least, I feel you don't need that kind of representation, etc."

as far as your benefits are concerned," that in the light of all these circumstances the employees should carefully evaluate the Union's claims put forth in its election propaganda because "you will not get anything more from this company with a union than you would get without a union and in the meantime you are going to be paying out $40 to $50 a year and perhaps more."

Hennemuth's third point consisted largely of a review of Respondent's wage structure and fringe benefits and comparisons with other plants operating under union contracts; a statement of Respondent's grievance procedure characterized as a "darn firm open door policy" on the part of its local manager, Fred Wills, and a promise that in the future this procedure would be further liberalized by permitting any aggrieved employee who was not satisfied with the response of the local office to appeal directly to Hennemuth in Respondent's main office; and an elaborate defense of Respondent's existing sick leave policy: "So bear in mind, that even if a union does come on these premises as a result of Thursday, that does not mean any such union will get paid sick leave. And I'm saying to you right now, it won't. This is not because we don't think it's a desirable benefit . . . We are just not ready to put in that kind of an expense in our fringe benefit package at this time, especially where we are now convinced that we already have a package that is as good as any you will find in industry generally." In this connection, Hennemuth told the employees that "no unionized plant in Raytheon has paid sick leave either." In summing up, Hennemuth told the employees, "So again, repeating the third thought I want to leave with you, without paying any of these costs that are union-involved, you already have a whole good series of kinds of compensation which once again I am satisfied would not have been any better even if you had had a union here and in the future it won't be any better just because a union is on the premises."

Hennemuth's "fourth and final" point was in substance an appeal to the loyalty of the employees. Coupled with this was the statement that in the three years that Re-

spondent had operated its Mountain View plant, with an outlay of millions, it had "never taken one lick of profit out of here." Followed a discussion of the company's "continuing determination to make a go of this place," and a final appeal, "So this is why I say to you that Raytheon in these three years has never given up on you. You know, we've had some rough sledding and we are asking you, please, to continue to work with us as a team. Give Mr. Wills the opportunity to make a profitable venture out of this and do it, please, without the intervention of some unnecessary outsider who can cause trouble by harrassment [sic], who can take money away from you, and who we are convinced is not going to bring you anything in return that you wouldn't get otherwise."

4. *Concluding findings*

While the Act provides that an employer's failure or refusal to agree to a union's proposals does not in and of itself constitute a refusal to bargain in good faith, this by no means licenses any employer to enter into bargaining negotiations with a mind closed against extending or varying existing employee benefits. An employer who tells his employees that they can gain through union representation only what he, the employer, unilaterally *chooses* to give them, and that they will gain no additional benefits through bargaining but stand to lose benefits already enjoyed, is not merely predicting what may be the ultimate results of collective bargaining, or stating mere possibilities, but is making flat statements of a pre-determined position on bargainable issues and is therefore voicing a rejection of the bargaining principle. What could be more illustrative of such a state of mind than Hennemuth's statement to the employees with respect to sick leave, an issue which obviously was a campaign issue: "So bear in mind, that even if a union does come on these premises as a result of Thursday [the election], that does not mean any such union will get paid sick leave. *And I'm saying to you right now, it won't,*" (emphasis supplied) and his further statement, "So again, repeating the third thought I want to leave

with you, without paying any of these costs that are union-involved, you already have a whole good series of kinds of compensation which once again I am satisfied would not have been any better even if you had had a union here *and in the future it won't be any better just because a union is on the premises.*" (emphasis supplied) The impact of these and kindred statements on the employees' minds is neither negatived nor neutralized by an occasional reference to the employees' freedom of choice and Respondent's intention to deal with them in good faith, regardless of the outcome of the election. As a matter of fact, in all the Hennemuth speeches there is not a single unequivocal statement that if the employees choose union representation the Respondent will enter into negotiations with an open mind on bargaining issues and will attempt, in good faith, to reach an agreement satisfactory to both the employer and the employees—essential elements of good faith bargaining. In the same category is Hennemuth's statement that in talking to the employees he was walking a tightrope since he could neither offer benefits nor threaten reprisals in the matter of their choice of union representation, in a context in which he was instilling fear into their minds that union representation though costly would be futile, and that a union's only recourse in obtaining for the employees anything that Respondent did not choose to give, was the strike with the attendant hardships that would be visited on the employees in such event. In sum, for all their carefully contrived appearance of amiability, the Hennemuth speeches were larded with statements which amount to an anticipatory refusal to bargain and as such were poorly concealed threats to deprive Respondent's employees of any and all benefits to be derived from the exercise of the right to collective bargaining through representatives of their own choosing. Supervisor Krest's interrogations of Alvarado about her union activities and statements that she could not gain but would lose through union representation, though minor in comparison, are not properly considered as isolated statements of a minor supervisor, but as a part of Respondent's general plan

of coercion as fully demonstrated in the Hennemuth speeches.

I find that the Respondent through Krest's anti-union statements and interrogation of Alvarado and, in major part, through the Hennemuth speeches, interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in conduct violative of Section 8(a)(1) of the Act.[4]

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[4] Hennemuth's statement that employees might address him directly in Respondent's eastern office with respect to grievances, is alleged to constitute an unlawful inducement, and while undoubtedly it was made to court favor with the employees, I am unable to view it as substantial enough to constitute a violation of Section 8(a)(1). Employees would have to be naive indeed to believe that Hennemuth in Respondent's eastern office would seriously entertain an individual grievance arising in the Mountain View plant already weighed and rejected by the local plant manager, and in any event a disgruntled employee could always avail himself of the freedom of the mails to address officials in the eastern office. I am also unable to view increased wages and benefits extended employees in September, 1965, some six months after the election, as a reward for the employees' rejection of union representation. In extending these benefits Respondent did compliment the employees on their "loyalty" but reference was also made to increased production. The matter is not entirely free from doubt due to the rather gloomy profit-and-loss picture given the employees by Hennemuth in February prior to the election, but I do not find a preponderance of evidence supporting an unlawful motive. Respondent's interrogation of Employees Shirley Ball and Katherin Lott through its counsel, Robert L. Molinar and Selig A. Saltzman, alleged to constitute unlawful interference with General Counsel's witnesses, has flimsy support in the testimony of Ball and Lott except that it does appear that they were asked if they had been interviewed by Board agents, and the latter was questioned about future appointments, if any, with such agents. The interviews appear to have been centered on the employees' recollection of Hennemuth's speech; the employees do not appear to have been questioned concerning the substance of their interviews with Board agents; Bell testified that Molinar told her not to worry about being subpoenaed to testify, "just to come in and tell the truth" as best she could, and if questioned by Board agents to tell them that she had been interviewed by the company lawyers; Lott admitted that at the start of the interview Molinar told her she was free to answer questions or not as she saw fit. While I believe it was improper for Respondent's counsel to question these employees concerning their meetings with

IV. Objections to the conduct of the election

Pursuant to a stipulation for certification upon a consent election executed by the parties on January 14, 1965, an election was conducted among Respondent's employees on February 4. On February 11, the petitioner herein filed timely objections to the conduct of the election. On June 2, the Board's Regional Director issued and served on the parties his report on objections; in which he recommended to the Board that the objections be consolidated for hearing with the complaint herein. On June 23, the Employer filed timely exceptions to the report and to the Regional Director's recommendation on the consolidation of cases. The matter was referred to the Board and on August 10, the Board found the exceptions without merit and ordered the hearing herein.

On all the evidence before me I find the objections to the conduct of the election well taken and shall recommend that the election of February 4 be set aside.

As set forth in detail in the preceding section of this report, the employer in seven speeches addressed to groups of employees sought to convince them that they should reject union representation. Only one day intervened between these speeches and the election. The petitioner requested permission to address the employees in similar fashion and the request was ignored. The employer's rule against "selling, soliciting, canvassing or distributing without prior management approval," effectively foreclosed the petitioner from presenting its claims and arguments to employees while they were on company premises. It issued numerous pamphlets but for their distribution had to rely on passing them out to employees on their entering or leaving company premises, mailing them to the employees' homes, or passing them out at union meetings. With respect to the first, many of the employees lived in geographical areas removed by miles from the plant, and therefore substantial numbers drove

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Board agents preparatory to testifying, and it is clear that such interrogations were in no way necessary or material to the preparation of a defense, the coercive element appears to have been slight if not altogether non-existent.

to and from work, about 95 percent according to estimates. The petitioner being barred from the company's parking lot, had to rely on reaching these employees as they were driving in and out of the lot. As to mailing, the petitioner had to ascertain the mailing address of the employees "by word of mouth" and as a result could reach only a small percentage of the total employment. Its meetings, according to its representatives, were attended largely by those who were highly partisan on behalf of the Union or who vigorously opposed it, and therefore the Union was unable to reach those who were neutral or not yet convinced one way or the other. Also, inasmuch as the plant was operating on three shifts, and meetings during the work week normally would follow at the end of a shift, obviously the hours were not propitious for drawing large numbers to the meetings.[5]

In short, on the facts of this case it is clear that through Respondent's restrictive rule on solicitations and because of other circumstances noted above, the employees were effectively barred from anything approaching an equal or comparable opportunity for hearing arguments favoring union representation, or contesting and refuting the propaganda literature and the captive audience speeches of the Employer. For this reason alone I would hold that the employees were denied the freedom of choice such as would have been theirs—and to which I think they were entitled—had they been afforded at least a reasonable approximation of equal access to the copious representations made by both proponents and opponents of union representation. It is on the basis of these findings, and interference violative of Section 8(a)(1) of the Act as found in Section III above, that I recommend that the election of February 4, 1965 be set aside.[6]

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[5] For instance open meetings for employees on the swing shift would start at 1 a.m.

[6] I agree with petitioner that coercive conduct engaged in by General Foreman Burke and Foreman Blackburn with respect to employees wearing IUE badges, not alleged as constituting unfair labor practices and occurring prior to a representation petition

Upon the basis of the foregoing findings of fact and upon the entire record in the case I make the following:

Conclusions of Law

1. The Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent's conduct as found in sections III and IV, *supra*, improperly affected the results of the election of February 4, 1965.

The Remedy

Having found that Respondent engaged in certain unfair labor practices I shall recommend that it cease and desist therefrom and that it take certain affirmative action to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act.

As I have found that Respondent's conduct improperly affected the results of the election I shall recommend that the election be set aside.

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being filed, may nevertheless be considered as background to conduct in issue, such as Krest's interrogation of Alvarado and the Hennemuth speeches, and when so considered tends to place the remarks of Krest, but more particularly Hennemuth, in their true perspective, since the few intervening months would not have sufficed to erase from the minds of affected employees fears of reprisal stemming from the Burke-Blackburn interrogations and threats. However, the exclusion from consideration of such background matters would leave, unaltered, the conclusions expressed in the text above.

RECOMMENDED ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the Act, it is recommended that the Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees in an unlawful manner concerning their union activities; threatening or implying a loss of existing benefits in the event they choose union representation; threatening or implying an anticipatory refusal to bargain on bargainable issues, such as sick leave, in such event.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action:

(a) Post in its Mountain View, California, plant copies of the notice attached hereto marked "Appendix A."[7] Copies of said notice to be furnished by the Regional Director for the Twentieth Region shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director for the Twentieth Region in writing within 20 days from the date of the

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[7] If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

receipt of this Decision what steps Respondent has taken to comply herewith.[8]

It is further recommended that the election which was conducted on February 4, 1965, be set aside.

Dated:

/s/ William E. Spencer
WILLIAM E. SPENCER
Trial Examiner

[8] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twentieth Region in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT (AS AMENDED)

we hereby notify our employees that:

WE WILL NOT interrogate our employees in an unlawful manner concerning their union affiliation and activities; interfere with their freedom of choice with respect to union representation by stating or implying a loss of existing benefits in the event they choose union representation; stating or implying an anticipatory refusal to bargain in good faith on bargainable issues in such event.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form, join or assist INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

WE WILL, on request, bargain in good faith on bargainable issues, including sick leave, in the event our employees designate the above-named union or

any other labor organization, their bargaining representative.

RAYTHEON COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 450 Golden Gate Avenue, Box 36047, San Francisco, California, 94102 (Telephone No. 556-0335).

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Raytheon Company, Mountain View, California, its officers, agents, successors, and assigns. The proceeding resulting in said Order is known upon the records of the Board as Case Nos. 20-CA-3554 and 20-RC-6201.

In support of this petition the Board respectfully shows:

(1) Respondent is engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on October 5, 1966, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law and, the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony, and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

/s/ MARCEL MALLET-PREVOST
MARCEL MALLET-PREVOST
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this day of

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

ANSWER OF RESPONDENT RAYTHEON COMPANY TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Raytheon Company (referred to herein as "Respondent") for answer to the petition of the National Labor Relations Board (referred to herein as the "Board") for the enforcement of its order against Respondent in the proceeding known upon the record of the Board as case Nos. 20-CA-3554 and 20-RC-6201, admits, denies and alleges as follows:

1. Admits that Respondent is engaged in business in the State of California within this judicial circuit and that this Court has jurisdiction of the petition by virtue of Sec. 10(e) of the National Labor Relations Act as amended (referred to herein as the "Act").

2. Denies that Respondent has engaged in any unfair labor practices within the meaning of Section 8(a) of the Act or has engaged in conduct which interfered with the representation election conducted under the direction and supervision of the Board's Regional Director at Respondent's Mountain View, California plant on February 4, 1965.

3. Alleges that the Trial Examiner's Findings of Fact, adopted by the Board, are not supported by substantial evidence in the record.

4. Alleges that the Trial Examiner's Conclusions of Law, adopted by the Board, to the effect that Respondent engaged in unfair labor practices proscribed by Sec. 8 (a) (1) of the Act and in conduct which interfered with said representation election conducted on February 4, 1965, are incorrect, erroneous and contrary to established legal precedent.

5. Alleges that the proceeding in case Nos. 20-CA-3554 and 20-RC-6201 is now moot as the conduct litigated in said proceeding was related to the first election conducted February 4, 1965 and in accordance with the Board's order a second election was conducted on June 23, 1967, under the direction and supervision of the Board's Regional Director.

6. Alleges that the order of the Board deprives Respondent of its right to free speech guaranteed by the First Amendment to the Constitution of the United States and by Sec. 8(c) of the National Labor Relations Act.

WHEREFORE, Respondent prays that this Court deny enforcement of the order of the Board in case Nos. 20-CA-3554 and 20-RC-6201 dated October 5, 1966.

Respectfully submitted,

ALFRED C. RHILLIPS
141 Spring Street
Lexington, Mass. 02173
Attorney for Raytheon Company

February 19, 1968

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

DOCKET No. 22,572

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RAYTHEON COMPANY, INTERVENOR

DOCKET No. 22,572A

MOTION OF RAYTHEON COMPANY TO DISMISS PETITIONS ON GROUND OF MOOTNESS AND MEMORANDUM IN SUPPORT THEREOF

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Raytheon Company, Respondent in Case No. 22,572, and Intervenor in Case No. 22,572A respectfully moves this Court, for an order dismissing the petitions in Cases Nos. 22,572 and 22,572A on the ground of mootness.

The facts upon which this motion is based are as follows:

On January 4, 1965, a petition for a representation election among production and maintenance employees

at Raytheon's Mountain View plant was filed with the National Labor Relations Board's regional office in San Francisco by the International Union of Electrical, Radio and Machine Workers, AFL-CIO (referred to herein as the "Union"). The proceeding initiated by the petition was designated on the records of the Board as Case No. 21-RC-6201.

In an election conducted on February 4, 1965, pursuant to a consent agreement, the final tally of ballots was: 301 for no union; 161 for IUE; and 54 for IBEW (an intervenor).

On February 11, 1965, the IUE filed objections to the election, and on April 6, 1965, it filed an unfair labor practice charge designated on the records of the Board as Case No. 20-CA-3554. (R 3)* By order of the Board's regional director dated October 19, 1965, the objections to the election in Case No. 20-RC-6201 and the unfair labor practice charge in Case No. 20-CA-3554 were consolidated for purposes of hearing. (R 12)

Following a hearing held on January 19 and 20, 1966, the trial examiner issued a decision dated June 13, 1966, in which he recommended that the election in Case No. 20-RC-6201 be set aside and that an order be entered in Case No. 20-CA-3554 finding that a speech by Raytheon Vice President Hennemuth and statements made by supervisor Krest to employee Alvarado constituted unfair labor practices within the meaning of Section 8(a)(1), requiring imposition of a cease and desist order and posting of an appropriate notice. In a decision, order and direction of second election issued on October 5, 1965, the Board, in substance, sustained the findings of the trial examiner. (R 41-44)

That portion of the Board's order pertaining to the unfair labor practice findings in Case No. 20-CA-3554 is presently before this Court in Cases 22,572 and 22,572A.

Pursuant to that portion of the Board's order pertaining to the objections to the election in Case No. 20-RC-6201, a second election was held on June 23, 1967. The final tally of ballots in that election was: 418 for no

* Designation R—refers to volume 1 of the Record on Appeal in these cases.

union, and 312 for IUE. Thereafter, on June 29, 1967, the IUE filed objections to the election. On September 27, 1968, the Board issued an order setting aside the second election and directing a third election. In the third election conducted on November 1, 1968, the final tally of ballots was as follows: 258 for no union; 204 for IUE. A copy of the Tally of Ballots is annexed hereto as Exhibit A and made a part hereof.

Thereafter, on November 12, 1968, the regional director issued a certification of results of election to the effect that no labor organization is the exclusive representative of the employees in the unit. A copy of this certification is annexed hereto as Exhibit B and made a part hereof.

WHEREFORE, Raytheon Company respectfully requests that this Court grant its motion to dismiss the proceedings herein on ground of mootness.

ALFRED C. PHILLIPS
PAUL B. ASCHER
Attorneys for Raytheon Company

By /s/ Alfred C. Phillips
ALFRED C. PHILLIPS

Dated at Lexington, Mass.
this 16th day of January, 1969

EXHIBIT A

NATIONAL LABOR RELATIONS BOARD

Case No. 20-RC-6201

Date issued November 1, 1968

RAYTHEON COMPANY, EMPLOYER

and

INTERNATIONAL UNION OF ELECTRICAL RADIO & MACHINE WORKERS, AFL-CIO, PETITIONER

Type of Election: *(Check one)*	*(If applicable check either or both):*
☐ Stipulation	☐ 8(b) (7)
☒ Board Direction	☐ Mail Ballot
☐ Consent Agreement	
☐ RD Direction	RERUN

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters	514
2. Void ballots	—
3. Votes cast for Petitioner	204
4. Votes cast for	—
5. Votes cast for	—
6. Votes cast against participating labor organization(s)	258
7. Valid votes counted (sum of 3, 4, 5, and 6)	462
8. Challenged ballots	1
9. Valid votes counted plus challenged ballots (sum of 7 and 8)	463
10. Challenges are (not) sufficient in number to affect the results of the election.	

11. A majority of the valid votes counted plus challenged ballots (item 9) has (not) been cast for: Petitioner

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For the Regional Director

/s/ Wm. Englin

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For RAYTHEON COMPANY
/s/ Jan Holt

for INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO
/s/ Hazel Cano

RC-RM-RD
EXHIBIT B

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Case No. 20-RC-6201

RAYTHEON COMPANY, EMPLOYER
and
INTERNATIONAL UNION OF ELECTRICAL RADIO & MACHINE WORKERS, AFL-CIO, PETITIONER

TYPE OF ELECTION (Check one)	(Also check box below where appropriate)
☐ Consent Agreement	☐ 8(b)(7)
☐ Stipulation	
☒ Board Direction	
☐ RD Direction	

CERTIFICATION OF RESULTS OF ELECTION

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that no collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that a majority of the valid ballots has not been cast for any labor organization appearing on the ballot, and that no such organization is the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

Signed at San Francisco, California
On the 12th day of November, 1968

[SEAL]

/s/ Roy O. Hoffman
Regional Director, Region 20
National Labor Relations Board

Memorandum In Support of Motion To Dismiss Petitions On Ground of Mootness

The petitions before the Court in Cases 22,572 and 22,572A are based upon a pre-election speech given by Raytheon Vice President Hennemuth to eight separate groups of employees and two alleged conversations between supervisor Krest and employee Alvarado. Both the speech and the alleged conversations occurred immediately prior to the first election in Case 20-RC-6201, which was conducted by the Board on February 4, 1965. As set forth in the Motion, the election of February 4, 1965, was set aside and a second election was held on June 23, 1967; the second election was set aside and the third election was held on November 1, 1968. The results of the third election have been certified by the Board.

These facts are identical in all material respects with those before this Court in *General Engineering, Inc.*, 311 F. 2d, 570 (CA 9) (9th Cir. 19). That case established that issues on review relating to pre-election conduct become moot where subsequent to issuance of its order relating to said conduct, the Board has held another election, the results of which have been certified. In reaching this conclusion, the Court relied upon the decision of the Supreme Court in *National Labor Relations Board*, v. *Jones & Laughlin Steel Corporation*, 331 US 416, 67 S.Ct. 1274, 91 L.ed. 1575 (1947) which held that Courts of Appeals in reviewing Board decisions have discretion to decide under particular circumstances whether an order has become moot.

It is submitted that, decisions in other circuits notwithstanding, this Circuit's decision in the *General Engineering* case is correct and should be applied to this case. Accordingly, the issues presented relating to the legal effect of the Hennemuth speeches and of the alleged conversations between supervisor Krest and employee Alvarado, are now moot. In each instance the alleged conduct was directly and immediately related to the election and, in fact, the Board relied solely on the Hennemuth speeches and Krest conversations in setting aside the election. (R 42 n. 2). In view of the subsequent certifi-

cation, these issues no longer require resolution by this Court. Therefore, both petitions herein should be dismissed.

Respectfully submitted,

ALFRED C. PHILLIPS
PAUL B. ASCHER
Attorneys for Raytheon Company

By /s/ Alfred C. Phillips
ALFRED C. PHILLIPS

Dated at Lexington, Mass.
this 16th day of January 1969.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RAYTHEON COMPANY, INTERVENOR

MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO MOTION OF RAYTHEON COMPANY TO DISMISS ON GROUND OF MOOTNESS

As set forth in our brief on the merits (Br., p. 6), Raytheon Company (herein the "Company"), pursuant to the normal administrative procedure, was found by the Board to have engaged in certain unfair labor practices. Specifically, the Board found that the Company had violated Section 8(a)(1) of the Act by coercively interrogating its employees as to their union activities, threatening that the employees would suffer a loss of existing benefits in the event they chose union representation; and promising an improved grievance procedure as an inducement to employees not to engage in union activity (R. 41-42, 18-26).[1] Accordingly, the Board acting pursuant to the authority granted by Section 10(c) of the Act, ordered the Company to cease and desist from the unfair labor practices found and to post the customary notice (R. 42-43, 26-28). In addition, the Board performing its duty of overseeing

[1] "R" references are to the pleadings and formal papers filed with the Court as "Volume I, Pleadings" in the instant case.

representation elections as set forth in Section 9 of the Act, directed that an election held among the Company's employees be set aside and directed the holding of a second election on the grounds that the aforementioned Company conduct had interfered with the holding of a fair election.[2]

Since the Board's decision was issued herein, as the Company correctly points out, a second and a third election have been held. In the first of these subsequent election the results were also set aside by the Board because of certain Company conduct. The results of the third election, however, which the Union lost by a vote of 258-204, were not objected to, and the Board, accordingly, certified that a majority of the employees had voted against being represented by any labor organization.

In its motion to dismiss and supporting memorandum filed herein the Company contends that since a valid and determinative election has been held, there no longer is any need for enforcement of the Board's remedial order in the unfair labor practice case and the petition for enforcement should be dismissed as moot. We submit, however, that the Company's contention misconceives the function and purpose of a Board cease and desist order and is contrary to settled law.

Initially, it is important to remember that Section 10 (c) of the Act expressly authorizes the Board to order a person who has engaged in an unfair labor practice "to take such affirmative action * * * as will effectuate the policies of this Act" and that under this provision, the Board has the power to enter an order which will restore "the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practices]" *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194 (1941). See also, *N.L.R.B.* v. *Strong, d/b/a Strong Roofing & Insulating Co.*, U.S. 70 LRRM 2100 (January 15, 1969); *Fibreboard Corp.* v. *N.L.R.B.*, 379 U.S. 023, 216

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[2] Under settled Supreme Court law, the propriety of the Board's decision to set aside the election is not before this Court for review. *A.F.L.* v. *N.L.R.B.*, 308 U.S. 401, 408-412 (1940); *Holly Hill Lumber Co.* v. *N.L.R.B.*, 380 F. 2d 838, 840 (C.A. 4, 1967); *Hendrix Mfg. Co.* v. *N.L.R.B.*, 321 F. 2d 100, 106 (C.A. 5, 1963) See also, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 477 (1964).

(1964). Under Section 10(c) it was clearly proper for the Board to issue a cease and desist order and notice posting requirement. Indeed, the Company does not even challenge the traditional appropriateness of this judicially approved remedy. See *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 230-231 (1938).

The Company is mistaken in its assertion that this proceeding to enforce the Board's order is rendered moot by the fact that since issuance of the Board's decision and order a valid election has been held in which the Board certified the results. An almost identical contention was expressly rejected in *N.L.R.B.* v. *Greyhound Lines*, 303 U.S. 261, 271 (1938). As the Court there stated, an order of the Board, "lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made" (*Ibid.*).[3] Accord, *N.L.R.B.* v. *Metalab-Labcraft*, 367 F. 2d 471, 472-473 (C.A. 4, 1966); *N.L.R.B.* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109, 111 (C.A. 7, 1963), cert. denied 377 U.S. 944; *N.L.R.B.* v. *Clark Bros. Co.*, 163 F. 2d 373, 375 (C.A. 2, 1947). As the Seventh Circuit stated in a case just like the one at bar, *N.L.R.B.* v. *Marsh Supermarkets, Inc.*, *supra*, 327 F. 2d at 111: "* * * if the Board's order is justified, it is entitled to have it enforced as a means of insuring that *in future elections the conduct may not be repeated* * * *" (emphasis added). Similarly, in this case, although a valid election has been held, the Board is entitled to have its order enforced in order to deter similar conduct in the event of future elections.

Rejection of the Company's motion is also required by the Supreme Court's decision in *N.L.R.B.* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950). There, the employer resisted enforcement of the Board's order on the ground that he had complied with its requirements and accordingly, since the case had thereby been rendered moot there was no need for a court decree. This conten-

[3] In *Greyhound*, the employer had urged that the Board's order requiring it to withdraw recognition from an employee association was rendered moot when a different union was certified by the Board as the exclusive bargaining representative of the employees.

tion was flatly rejected, the Court pointing out that, "A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree." *Id.*, at 567, emphasis added. Accord, *N.L.R.B.* v. *Rippee*, 339 F. 2d 315, 316 (C.A. 9, 1964).

Finally, we recognize that this Court's decision in *General Engineering, Inc.* v. *N.L.R.B.*, 311 F. 2d 570 (1962) is at odds with the Board's position as set forth above. It is respectfully requested, however, that this Court reconsider its decision in *General Engineering* in light of the Supreme Court's decisions in *N.L.R.B.* v. *Greyhound Lines*, *supra* and *N.L.R.B.* v. *Mexia Textile Mills*, *supra*. In addition, we would also point out that in *N.L.R.B.* v. *Rippee*, *supra*, decided subsequent to *General Engineering*, the Court rejected a contention that a change in circumstances rendered a Board order moot.[4]

CONCLUSION

For the reasons stated it is respectfully submitted that the Company's motion should be denied.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
ALLISON W. BROWN, JR.,
JOHN I. TAYLOR,
Attorneys,
National Labor Relations Board.

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[4] In *General Engineering, Inc.*, the Court appeared to consider as controlling certain language in *N.L.R.B.* v. *Jones & Laughlin Steel Co.*, 331 U.S. 416, 428 (1947). The quoted portion, however, does not stand for the principle that a subsequent valid election renders a Board order moot; rather, it simply states that when a Board order is moot enforcement may be denied. Since, as we have shown above, the Board is entitled to have a court decree *barring* the resumption of unfair labor practices, we submit that the Board's order herein has not been rendered moot and enforcement should be granted. See *N.L.R.B.* v. *Marsh Supermarkets, Inc.*, *supra*, 327 F. 2d at 111.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No. 22,572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

Docket No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RAYTHEON COMPANY, INTERVENOR

OPPOSITION AND ANSWER TO MOTION

NOW COMES, the International Union of Electrical, Radio and Machine Workers, AFL-CIO (herein "the IUE"), the petitioner in Appeal No. 22,572A and the intervenor in Appeal No. 22,572, and opposes the Motion of the Raytheon Company (herein, "the Company") to dismiss the said appeals on the ground of mootness.

Mootness is claimed for the reason that the IUE proceeded with the election that the Board directed in Case No. 20-RC-312, following the invalidation of an earlier election as a result of objections filed by the IUE. In effect, the Company argues that it is not required to remedy unfair labor practices because they occurred during the previous election campaign and that the election which was subsequently held was certified as a valid one.

Election objections are considered in relation to the laboratory conditions that the Board requires for the conduct representation election and may not be equated with

unfair labor practices, which is the subject of the Board's order and remedy in this case.

In *Sonoco Products Co.* v. *N.L.R.B.*, —— F.2d —— (9th Cir., Aug. 7, 1968, No. 24,802), 69 LRRM 2037, this Court sustained the Board's broad discretion in certifying election results, and setting them aside, as follows:

> "Petitioner's claim that section 8(c) of the Act bars the conclusion we have reached must be rejected. That section provides,
>
> > 'The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.' 29 U.S.C. § 158(c) (1964).
>
> "Here, however, Hughes' speech directly resulted not in the finding of an unfair labor practice, but merely in the invalidation of the first election.
>
> "There is some force to petitioner's contention that the distinction between a ruling that an unfair labor practice has been committed and a decision to set aside an election is not really meaningful so far as the strictures of section 8(c) are concerned. For when an employer challenges an adverse representation decision by refusing to bargain with the winner of a subsequent election—as an employer must do in order to secure review of such a decision—an employer will of course be found to have violated section 8(a)(5) of the Act if the representation decision is upheld. Speech protected by section 8(c) may, then, play a real part in the ultimate finding of an unfair labor practive. *We read Foreman & Clark, Inc. v. NLRB, 215 F.2d 396, 408-09, 34 LRRM 2697 (9th Cir.), cert. denied, 348 U.S. 887, 35 LRRM 2129 (1954), however, as committing this court to the contrary position—a position we cannot conclude is unsound.* See also NLRB v. Shirlington Supermarkets,

> Inc., 224 F.2d 649, 652-53, 36 LRRM 2485 (4th Cir.), cert. denied, 350 U.S. 914, 37 LRRM 2142 (1955)." (Underlining supplied.)

And in *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F.2d 396, 410 (9th Cir. 1954), certiorari denied 348 U.S. 887, this Court also said:

> "Under the facts of this case, however, viewed in the light of the decisions applicable thereto, we agree with the Board's determination that the tailor-shop employees constitute an appropriate bargaining unit, and with its decision to set aside the first election because of the Company's last minute campaign speeches during working hours, under the circumstances already detailed. The latter decision was a proper exercise of the Board's 'wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees'. National Labor Relations Board v. A. J. Tower Co., supra, 329 U.S. at page 330."

See also *General Shoe Corporation*, 77 NLRB 124, 126, 127. To equate the subsequently conducted election as an event that removed the requirement of a remedy for the employer's unfair labor practices in the previous election campaign, would have the effect of qualifying and limiting the discretion of the Board with respect to its conduct of elections. Certainly, the aforesaid event may not be deemed a waiver of the necessity for a remedy of the unfair labor practices that occurred.

There is no exculpatory provision in the Act which permits the commission of unremediable unfair labor practices which occur during any particular period, such as an election campaign. (*Cf.* Section 10(b) of the Act, the six month limitation.)

The November 1968 election, which the Union lost, is the entire predicate of the Company's instant motion. This election result does in no respect mean that the IUE will not, at some permissible date, petition once again and institute another campaign so that it may be elected as the exclusive bargaining representative of the Com-

pany's employees. In these premises, this Court's enforcement of the Board's outstanding order will tend to prevent repetition of the Company's unlawful conduct in future elections. The unfair labor practices that are involved in this case are intrinsically related to and arise out of the exercise of the employees' right to seek representation under the Act. The apparent absence of employer misconduct during the November 1968 election may be explained by the pendency of this enforcement proceeding. However, repetition of the misconduct, which this proceeding seeks to rectify, can only be effectively accomplished by a remedial order and not upon whether or not the Company will respect its employees' statutory rights in one election and violate them in another.

The Company relies on *General Engineering* v. *N.L.R.B.*, 311 F.2d 570 (9th Cir. 1963). This decision declared that an intervening election "makes moot all portions of the order under review which relate to the representation case" and remanded to that part of the Board's order which found certain conduct to have interfered with the free selection by employees of a bargaining representation, in violation of Section 8(a)(1) of the Act.

In *N.L.R.B.* v. *Marsh Supermarkets, Inc.*, 327 F.2d 109 (7th Cir. 1963) that Circuit Court expressly refused to follow the *General Engineering* decision which relied upon the *obitur* comment in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428, because said comment ". . . beg[s] the question of mootness and [is] concerned with procedure." In *N.L.R.B.* v. *Marsh Supermarkets, Inc.*, *supra* at 111, the Court of Appeals for the Seventh Circuit held:

> "When the Board finds that unfair labor practices have been committed, it is entitled to have its order enforced by the courts to prevent repetition of that unlawful conduct in the future. Neither compliance with the Board's order, N.L.R.B. v. Mexia Textile Mills, Inc., 339 U.S. 563, 567, 70 S.Ct. 833, 94 L.Ed. 1067 (1950), nor a subsequent certification of the union as bargaining representative, N.L.R.B. v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261,

58 S.Ct. 571, 82 L.Ed. 831 (1938), renders the cause moot.

"In a factual situation close to the one at bar, the Second Circuit in N.L.R.B. v. Clark Bros. Co., 163 F.2d 373 (2d Cir. 1947), decided that the holding of a second election, as ordered by the Board, and the certification of an independent association as bargaining representative, did not render moot the question whether the company's conduct in the original election violated the Act. The court said, 163 F.2d at 375, 'The CIO will doubtless continue its organizational efforts and may hereafter petition for another election. If the Court makes no decision as to respondent's former conduct, it may then be repeated; hence a decision as to its legality will not be a futile exercise of jurisdiction.'

"In the case before us if the Board's order is justified, it is entitled to have it enforced as a means of insuring that in future elections the conduct may not be repeated. We conclude the Yorktown questions are not moot."

Like the Seventh Circuit in the *Marsh Supermarkets* case, the Fourth Circuit Court of Appeals (*N.L.R.B.* v. *Metalab-Labcraft, Division of Metalab Equipment Company*, 367 F.2d 471 (4th Cir. 1966)) and the Second Circuit Court of Appeals (*N.L.R.B.* v. *Clark Bros. Co.*, 163 F.2d 373 (2d Cir. 1947)) have also expressed disagreement with the mootness result that was obtained in *General Engineering* case.

In *N.L.R.B.* v. *Metalab-Labcraft, Division of Metalab Equipment Company, supra*, the intervening election resulted in the designation of the union as exclusive bargaining representative. This fact did not induce that Court * to declare moot the unfair labor practices that

* The *General Engineering* mootness conclusion was discussed by the Fourth Circuit Court of Appeals in the *Metalab case*, as follows:

"The ready answer to the charge of mootness is that District 50 may again campaign for selection as the bargaining agent of the employees at some permissible future date and enforce

occurred during the prior election campaign because it was recognized that the unsuccessful union might again institute a future campaign and that the Board's order may serve to prevent a repetition of the unlaw conduct. In this case it will be permissible for the IUE to petition for another election in November of 1969 (Section 9(c)(3) of the Act) as compared to the unsuccessful union in the *Metalab case* which was subject to a contract (or election) bar of as much as three years.

This Court, in *General Engineering*, considered *only* the fact that a new election had been properly held. It did not consider the likelihood that the unsuccessful union in *General Engineering* would be involved in a future attempt to be selected as the exclusive bargaining representative. Here, the IUE is committed to a further election campaign that will commence upon the very heels of this Court's decision. This fact clearly distinguishes the factual basis for the *General Engineering* decision and constitutes a tangible and compelling support for a finding that enforcement of the Board's outstanding order will insure against the repetition of the unlawful Section 8(a)(1) conduct in such subsequent elections that may be conducted.

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ment of the Board's order may serve to prevent a repetition of Metalab's unlawful conduct. This line of reasoning has prompted two other circuits, in cases posing enforcement questions quite similar to the question presented on this appeal, to grant enforcement of Board orders with respect to pre-election unfair labor practice conduct by an employer. NLRB v. Marsh Supermarkets, Inc., 327 F.2d 109 (7 Cir. 1963), cert. denied, 377 U.S. 944, 84 S.Ct. 1351, 12 L.Ed.2d 307 (1964); NLRB v. Clark Bros. Co., 163 F.2d 373 (2 Cir. 1947)."

WHEREFORE, the International Union of Electrical, Radio and Machine Workers, AFL-CIO, respectfully requests that this Court deny the motion to dismiss the proceedings herein on the ground of mootness.

Respectfully submitted,

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Dated at Washington, D.C.,
January 27, 1969.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

RAYTHEON COMPANY, RESPONDENT

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RAYTHEON COMPANY, INTERVENOR

[February 19, 1969]

On Petition for Enforcement and on Petition to Review an Order of the National Labor Relations Board

Before: CHAMBERS, KOELSCH, and BROWNING, Circuit Judges

PER CURIAM:

The Board found that Raytheon Company, in connection with a representation election at its Sunnyvale, California plant, committed labor practices made unfair by Section 8(a)(1) of the Act. In No. 22572, the Board petitions for enforcement of its ensuing cease and desist order, and in No. 22572A, the International Union of Electrical, Radio and Machine Workers, AFL-CIO, the charging party and intervenor, petitions for a review of the Board's ruling refusing to amend the Complaint.

During oral argument in this court counsel for Raytheon made a suggestion of mootness. With leave of court, Raytheon was permitted to supplement the record and move the dismissal of the proceedings. From the ad-

ditional materials submitted pursuant to such leave, it now appears without contradiction that since these petitions were filed the Board has held a new representation election and certified the result.

Accordingly, on the authority of *General Engineering, Inc.* v. *N.L.R.B.*, 311 F.2d 570 (9th Cir. 1962), Raytheon's motions are granted and the proceedings are dismissed.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, RESPONDENT

JUDGMENT

Upon Petition to enforce an order of the National Labor Relations Board.

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and on motion of respondent for dismissal of petition to enforce and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be and hereby is granted and that the petition to enforce order of the said National Labor Relations Board in this Cause be, and hereby is dismissed.

Filed and entered: February 19, 1969.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RAYTHEON COMPANY, INTERVENOR

JUDGMENT

Upon Petition to Review an order of the National Labor Relations Board.

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and on motion of intervenor for dismissal of petition to review and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be and hereby is granted and that the petition to review order of the said National Labor Relations Board in this Cause be, and hereby is dismissed.

Filed and entered: February 19, 1969.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

RAYTHEON COMPANY, RESPONDENT

No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RAYTHEON COMPANY, INTERVENOR

Before: CHAMBERS, KOELSCH and BROWNING, Circuit Judges

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestion for a rehearing en banc is rejected.

United States Circuit Judges

[filed May 8, 1969]

SUPREME COURT OF THE UNITED STATES

No. 440, October Term, 1969

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RAYTHEON COMPANY, ET AL.

ORDER ALLOWING CERTIORARI. Filed November 10, 1969

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such wit.

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